

KNOW YOUR RIGHTS



Transgender People & the Law

FREQUENTLY ASKED QUESTIONS



**LESBIAN GAY
BISEXUAL TRANSGENDER
& AIDS PROJECT**



ACLU
AMERICAN CIVIL LIBERTIES UNION

FOUNDATION

LESBIAN GAY
BISEXUAL TRANSGENDER
& AIDS PROJECT

Transgender People and the Law Frequently Asked Questions

CONTENTS

- **Discrimination in Employment, Housing, Public Places and Schools** 2
 - **Name Change and Identity Documents** 6
 - **Family Matters** 9
 - **Health Care Coverage** 11
 - **Criminal Law and Transgender People** 12
 - **Transgender Rights in Prison** 13
 - **Transgender Immigrants** 14
 - **Notes on Words and Phrases Used** 15
-

Discrimination in Employment, Housing, Public Places, and Schools

■ Are there laws that clearly prohibit discrimination against transgender people?

Yes. California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington and the District of Columbia all have such laws. Their protections vary. Minnesota's law bans discrimination in employment, housing, education and public accommodations; Hawaii's covers only housing.

At least 93 cities and counties have passed their own laws prohibiting gender identity discrimination including Phoenix, Atlanta, Louisville, New Orleans, Cincinnati, Pittsburgh, Indianapolis, Dallas and Buffalo. Visit the "Legislation: Non-Discrimination Laws" section at www.transgenderlaw.org for a list of "U.S. jurisdictions with laws prohibiting discrimination on the basis of gender identity or gender expression."

The governors of some states (e.g., Kansas, Michigan) have banned discrimination against transgender state workers through executive orders. Unless an executive order is expressly limited in duration or is rescinded, its protections usually stay in effect even after the person issuing the order leaves office. Some cities and counties have also passed protections for their transgender public employees. Visit the "Legislation: Non-Discrimination Laws" section at www.transgenderlaw.org for a list of "U.S. jurisdictions prohibiting discrimination in public employment on the basis of gender identity and expression."

■ **Do laws that prohibit sexual orientation discrimination protect transgender people?**

In some cases, yes. If the law banning discrimination based on sexual orientation defines it to include gender identity (as Minnesota's does), it does protect transgender people as well as lesbians and gay men.

Most sexual orientation nondiscrimination laws prohibit discrimination based on perceived as well as actual sexual orientation. Therefore, a transgender person is protected by these laws if the perpetrator's actions stemmed from his or her belief (accurate or not) that the victim was gay.

■ **Do laws that prohibit sex discrimination protect transgender people?**

An increasing number of courts say yes. Although there are some bad older decisions saying that the federal law banning sex discrimination (Title VII of the 1964 Civil Rights Act) does not prohibit gender identity discrimination, federal courts that have considered the issue more recently (e.g., the Courts of Appeals for the Sixth and Ninth Circuits, covering Kentucky, Michigan, Ohio and Tennessee as well as the West Coast states, Alaska, Arizona, Hawaii, Idaho, Montana and Nevada) have found some protections in the 1964 Civil Rights Act for transgender people.

Reflecting the federal trend, some state courts and administrative agencies (in Connecticut, Hawaii, Massachusetts, New Jersey, New York and Vermont) have said that their state or local sex discrimination law covers discrimination against transgender people.

■ **Do laws that bar disability discrimination protect transgender people?**

Federal laws that prohibit disability discrimination specifically say no. Some state disability laws do likewise (e.g., Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas, Virginia). In a more positive development, California amended its disability law in 2000 to include protections for people with gender identity disorder.

Courts or administrative agencies in at least seven states—Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York and Washington—have ruled that some transgender people are protected under state disability laws. Virtually all these rulings involve transgender people with a diagnosis of gender identity disorder.

■ **Does the U.S. Constitution protect transgender people from discrimination?**

Although the U.S. Supreme Court has never considered this question, we think the answer is yes. It is important to remember, however, that constitutional protections only cover discrimination or mistreatment by the government.

The U.S. Constitution's guarantee of equality protects transgender people from being treated differently by the government because of fear or hostility. If, for example, a government supervisor imposes a dress code on a male-to-female transgender worker that is different from that required of other female workers for no reason other than his or her dislike of transgender people, that violates the constitutional right to equal treatment. Equality protections for transgender people are not yet nearly as robust as those for people of color and women.

In our view, the First Amendment, which bars government from censoring speech or expression, also protects our right to dress in a way consistent with our gender identity. The way we dress is an important form of personal expression.

Finally, individuals have important interests in the determination of their gender and the expression of their gender through personal appearance and mannerisms, which are interests that we believe the Due Process Clause recognizes and protects. These constitutional arguments, however, have not yet achieved widespread acceptance by courts.

State constitutions are also a source of protection against discrimination by government actors.

■ **Are there laws that specifically protect transgender students from discrimination?**

California, Iowa, Minnesota, New Jersey, Oregon, Vermont and Washington have laws explicitly protecting transgender students from discrimination and/or harassment. Moreover, there are local school districts such as Decatur (GA) and Kalamazoo (MI) with similar protections. Some states have comprehensive laws banning bullying and harassment of any sort but not mentioning gender identity.

The federal law prohibiting sex discrimination in educational programs receiving federal funds (Title IX of the Education Amendment Acts of 1972) bars sexual harassment of a transgender student. Title IX also prohibits gender-based harassment, which includes harassment based on a student's refusal to conform to sex stereotypes. Therefore, Title IX ought to protect transgender students from harassment and discrimination, but the courts are still grappling with the issue.

■ **Does the law protect a transgender person's right to use the restroom consistent with his or her gender identity?**

There's no clear answer because very few courts have considered this question. The Minnesota Supreme Court has ruled that even a law prohibiting gender identity discrimination does not necessarily protect an individual's desire to use a gender identity-appropriate restroom at work. In a non-workplace context, a New York appeals court has ruled that it is not sex discrimination to prevent transgender people

from using gender identity-appropriate restrooms in a building housing several businesses.

Some government agencies, however, make clear that denying transgender people the right to use a gender identity-appropriate restroom violates their nondiscrimination law. The San Francisco Human Rights Commission, for example, requires businesses and public places to allow all persons to use the restroom of their gender identity so long as they have a current piece of ID that contains the gender marker that corresponds with the facility the person wants to use. Likewise, the New York City Human Rights Commission has issued regulations stating that a business that refuses to allow a transgender person to use a gender-identity-appropriate restroom may be violating the city's nondiscrimination law.

Many businesses, universities and other public places are installing single-use, unisex restrooms, which alleviate many of the difficulties that transgender people experience when seeking safe restroom access.

Name Change and Identity Documents

■ Can a person change his or her name to reflect his or her gender identity?

Yes. In most states, through what is called “common law name change,” people may change their name simply by using a new name in everyday interactions. It is free and easy, but does not create the kind of solid paper trail needed to change identity documents.

The other way to change a name is to file a petition in court. Most judges will grant a name change so long as they are convinced that the petitioner is not trying to evade debts or the police.

In rare cases, judges have required a petitioner to prove that he or she has undergone certain medical procedures

that show an intention to live permanently in the gender associated with the name desired. While many states require such proof to change the gender marker on identity documents such as a driver's license or birth certificate, requiring such proof simply for a name change is usually more than the law requires.

■ **Can a person get name and gender marker changed on his or her birth certificate?**

A court-ordered name change is needed to change the name on one's birth certificate.

In most states, changing the gender marker on one's birth certificate requires proof of surgical treatment to change one's sex and, in many cases, a court-ordered name change. What the law means by "surgical treatment" is unclear. In many cases, a letter from a doctor documenting that one has completed all the recommended medical treatment for "altering one's body and appearance" or "a gender transition" is enough.

Some states (e.g., Alaska) will not actually issue a new birth certificate but will instead issue an amended birth certificate documenting the name and gender marker changes. Other states (e.g., Idaho, Ohio and Tennessee) simply will not allow gender markers to be changed on birth certificates. For state-by-state instructions on how to change birth certificates, go to www.drbecky.com/birthcert.html.

■ **Does changing the gender marker on the birth certificate legally change one's sex?**

Although changing the gender marker on one's birth certificate should put to rest once and for all the question of one's legal gender, there have been cases, usually involving marriages, where courts have ignored the corrected birth certificate. Specifically, courts in Kansas and Texas considered only the birth-assigned sex when ruling on the determination of a person's sex for the purpose of deciding on the validity of his or her marriage. These courts ignored the fact

that the transgender women in these cases had corrected birth certificates from other (i.e. their home) states.

To deal with this problem, some individuals obtain a court order declaring a legal change of gender. (To save time and money, some advocates recommend doing this when petitioning for a court-ordered name change.) The good thing about a court order is that, unlike a birth certificate or other identity document, courts and agencies in other states are supposed to follow it. There is still no guarantee, however, that such a court order will force any court anywhere to consider one's sex legally changed when deciding the validity of a marriage.

■ **Can a person change his or her name and gender marker with the Social Security Administration?**

Yes. To change one's name, a person needs proof of his or her old and new identities. The Social Security Administration (SSA) officially requires sex-reassignment surgery in order to get the gender marker changed. A letter from a doctor documenting that one has "completed all the recommended medical treatment" for "altering one's body and appearance" or "a gender transition" is frequently enough.

■ **Is it advisable to change one's name and gender with the Social Security Administration?**

Yes. Ensuring that the SSA record of one's gender is consistent with the gender marker on other identity documents will help avoid problems.

The risk of problems caused by not changing SSA records is particularly high in the work context. The SSA writes to an employer when it notices that the personal information it has about a social security number (usually name, but sometimes gender) does not match the information being reported by the employer. These so-called "No-Match" letters often end up "outing" a transgender employee at work. For more information about "No-Match" letters, see "I-9 No-Match Letters:

Frequently Asked Questions” at the website of the National Center for Transgender Equality, www.nctequality.org.

Some states require people to update their SSA records before getting their gender marker changed on state documents like drivers’ licenses.

Finally, the growing threat of a federal ID card system increases the likelihood that in the near future, one’s SSA gender marker will be considered the last word on one’s gender.

■ **Can a person change name and gender on his/her passport?**

Yes. A copy of the court order confirming the name change is required to change the name on one’s passport. A detailed statement from one’s surgeon or hospital that one has had sex reassignment surgery, or plans to, is needed to get the gender marker changed.

To change the gender marker, the State Department often simply “stamps over” the previous gender marker on the passport. The stamp states that a change of sex took place on a particular date. It is advisable, therefore, to request a new passport instead of a passport amendment. A letter explaining why a new passport (and not a “stamp over”) is needed should be submitted along with any additional documents required by the State Department.

Family Matters

■ **If one spouse in a marriage transitions, is the couple still legally married?**

Yes. A marriage is valid unless and until one or both spouses get a divorce or annulment.

Even without a divorce or annulment, legal problems can arise from a spouse’s transition. For example, employers

have been known to refuse health benefits to a spouse who is now of the same sex as the employee. Likewise, when one spouse dies, the surviving spouse may have problems collecting inheritance or tax benefits restricted to married couples. There's very little law at this point on these issues.

■ **Is the marriage of a post-transition transsexual to a person of a different sex legal?**

It depends on where you live. Courts in Florida, Kansas, New York, Ohio and Texas have said no, explaining that what counts in those states is either the chromosomal or the birth-assigned sex. Courts in California, Maryland and New Jersey have taken a more expansive view, ruling that the post-transition sex of the transsexual spouse determines whether the marriage is valid. In Massachusetts, where same-sex couples can get married, this question does not arise.

■ **Does transitioning during marriage affect parental rights?**

Not necessarily. Many transgender parents continue to raise their children successfully.

Transgender parents sometimes fare poorly, however, on custody and visitation disputes in divorce proceedings, where judges base their decisions on what they believe to be in the children's best interest. In Colorado, Minnesota and Montana, judges have ruled that a parent's status as transgender or a cross-dresser does not harm his or her child. Court decisions in Missouri, Nevada and New York, however, did not favor the transgender parent.

Health Care Coverage

■ **Do any government health care programs cover sex reassignment surgery or other transition-related medical treatment?**

Generally speaking, it is difficult to get Medicaid coverage of transition-related treatment. No state explicitly permits it, and many states explicitly deny it. In those that do not explicitly permit or deny it, coverage may still be denied under the rationale that transition-related treatment is “experimental” or “cosmetic.” In at least one state (e.g., California), however, transgender people have been successful in securing Medicaid coverage for the costs of transition-related care.

Medicare explicitly excludes coverage for sex reassignment surgery. The managed health care program for active duty and retired armed forces members (formerly known as the Civilian Health and Medical Program of the Uniformed Services) excludes all services related to gender dysphoria, including therapy, prescription drugs (e.g., hormones), and sex reassignment surgery.

■ **Does private health insurance cover sex reassignment surgery or other transition-related medical treatment?**

This depends on what the contract with the health insurance company says. Today, most insurance contracts either expressly exclude many forms of transition-related services or are unclear about whether such services are covered. Some transgender people have successfully forced insurance companies to pay for sex reassignment surgery when the contract did not clearly exclude this coverage.

■ **What does the law say about insurance companies denying coverage for routine medical treatments because one has undergone sex reassignment procedures?**

Not much yet. The problem arises because insurance companies usually ask individuals to indicate their gender and then restrict coverage to treatment that “corresponds” to that gender. If the individual does not indicate gender, the insurance company often assigns one based on the kind of care the individual generally receives. This obviously causes problems for transgender individuals who need some treatment corresponding to their pre-transition gender and other care corresponding to their post-transition gender (e.g., gynecological care for female-to-male individuals who still have some female reproductive organs).

There is very little law on this issue, but the first court decision on it was good. In 2000, a Massachusetts court ruled that a woman could not be denied breast reconstruction surgery that was medically necessary for reasons unrelated to her gender transition simply because she is transsexual. In a more sweeping development, California passed a law in 2005 prohibiting health, disability, and life insurance companies from discriminating on the basis of gender identity.

Criminal Law and Transgender People

■ **Are there laws that prohibit hate crimes against transgender people?**

Yes. California, Connecticut, Hawaii, Minnesota, Missouri, New Jersey and Vermont all have transgender-inclusive hate crime laws. Visit the “Hate Crime Laws” section at www.transgenderlaw.org for a list of “Jurisdictions with Transgender-Inclusive Hate Crime Laws.” There is, however, no federal law protecting transgender people from hate crimes.

■ **Is cross-dressing against the law?**

Not in most places. A few places, however, still have laws outlawing cross-dressing, and police often use them to harass transgender people. Anyone arrested under a cross-dressing law should think about fighting back in court because there's a good chance that the law will be ruled unconstitutional.

Transgender Rights in Prison

■ **Are prison officials required to place a transgender inmate in the facility that matches the inmate's gender identity?**

When considering this question, most courts have supported the decision of prison officials about where a prisoner should be housed. Unfortunately, most prisons still house transgender women (particularly those who have not undergone sex reassignment surgery) in male facilities. Nevertheless, a growing number of prison systems are developing more respectful housing policies in part because they fear being held liable in court if they fail to protect transgender inmates from rape and other forms of abuse.

■ **Do transgender prisoners have a right to get hormone therapy?**

There is no clear answer. The U.S. Bureau of Prisons has a policy of providing hormones at the level the prisoner was getting them before incarceration. There is no guarantee, however, that hormones will be provided at the right levels and with the necessary support services.

In other prisons, transgender inmates have frequently been denied any transition-related health care. Using the argument that the Constitution prohibits cruel and unusual punishment, some prisoners have been able to persuade judges to order prison officials to provide hormone therapy. By and

large, however, courts are reluctant to order prisons to provide particular forms of medical care, especially those that prison medical officials think are not “necessary.”

Transgender Immigrants

- **May a transgender immigrant be granted asylum in the United States because of anti-transgender harassment in his or her country of origin?**

Yes. More and more transgender immigrants are being granted asylum after making the case that they’ve been persecuted at home because of their failure to conform to cultural gender roles and/or sexual orientation. While many of the courts addressing the issue confuse sexual orientation with gender identity, it is clear that transgender people are a “particular social group” entitled to the protection of asylum laws.

A transgender person, however, must do more than show that he or she is transgender and was persecuted because of it in order to get asylum. The individual must also prove either that the government persecuted him or her or refused to do anything to stop the abuse.

Notes on Words and Phrases Used

WHEN TALKING ABOUT TRANSGENDER PEOPLE, WE SOMETIMES USE WORDS RELATIVELY UNFAMILIAR TO NON-TRANSGENDER PEOPLE. TO MAKE SURE THERE'S NO CONFUSION, HERE'S WHAT WE MEAN BY THESE TERMS:

Gender identity

Gender identity is a person's internal sense of being a man or a woman.

Gender expression

The way a person reveals his or her gender identity is *gender expression*. A person's clothing, mannerisms, voice, etc., can all be a part of the person's *gender expression*.

Transgender

Transgender is frequently used to describe a broad range of identities and experiences that fall outside of the traditional understanding of gender. Therefore, in addition to those people who wish to transition from one gender to another or have done so (who are often described by the clinical term "transsexual"), *transgender* often is meant to encompass a larger community that includes, for example, cross-dressers and intersex individuals. Some transgender people prefer to describe themselves as *gender variant* or *gender nonconforming*.

Not everyone who does not conform to gender stereotypes, however, identifies as *transgender*. In particular, there are many people, including children, who do not conform to gender stereotypes but do not experience conflict between their gender identity and the gender assigned to them at birth.

Transsexual

Transsexual is the clinical term used to describe people who experience a conflict between their physical sex and their

gender identity. For example, a person born with a female body but with primarily a male gender identity is a *transsexual male*. Because the term has clinical roots, it is widely used to describe the subset of people who wish to alter, are altering, or have changed their bodies hormonally and/or surgically to match their gender identity. We have used *transsexual* in this way, while recognizing that there is no one course of medical treatment that is necessary for a transsexual individual.

(Gender) Transition

Transition or *gender transition* describes the long, complex process of altering a person's birth-assigned sex to match his or her gender identity. *Gender transition* can include hormone therapy, presenting full-time in the gender corresponding to one's gender identity, and, in some but not all cases, sex reassignment surgery.

Gender identity disorder

Gender identity disorder is the medical diagnosis for individuals who experience a disconnect between their birth-assigned sex and their gender identity. The term *gender dysphoria* is often used instead of *gender identity disorder*, reflecting in part a skepticism about whether it is appropriate to consider dissonance between one's gender identity and one's body as a "disorder."

Sex reassignment surgery

Although many people (and courts) focus exclusively on genital surgery, there are in fact a number of surgical procedures encompassed by the umbrella term *sex reassignment surgery*, including genital surgery, breast augmentation or reduction and hysterectomy.

CONTACT US:



FOUNDATION
**LESBIAN GAY
BISEXUAL TRANSGENDER
& AIDS PROJECT**

American Civil Liberties Union

Lesbian Gay Bisexual Transgender & AIDS Project

125 Broad Street, 18th Floor

New York, NY 10004

212.549.2627

lgbt@aclu.org

aclu.org/lgbt
